IN THE

United States Circuit Court of Appeals

FOR THE SEVENTH CIRCUIT.

OCTOBER TERM, A. D. 1931.

No. 4710

AMERICAN CAR AND FOUNDRY COMPANY, a Corporation, *Libelant and Appellant,* vs. H. A. BRASSERT, *Respondent and Appellee.*	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division. Honorable Geo A. Carpenter, District Judge.

ANSWER TO PETITION FOR REHEARING.

MR. ROY O. WEST,
MR. PERCY B. ECKHART, and
MR. LEWIS C. JESSEPH,
Counsel for Appellee.

[illegible] PRINTING COMPANY, CHICAGO.

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ANSWER TO PETITION FOR REHEARING.

I.

Under Point I of its petition for rehearing, appellant contends that the court erred in holding appellant was not the "owner" of the boat within the meaning of the Limited Liability Statute of the United States.

The argument in the petition is largely a repetition of the contention found in appellant's brief on this question. On page 3 of the petition, however, after quoting from the opinion of the court, it is said:

> "The *implication* in the use of the words 'bare legal title' is that the contract, though referred to as a 'conditional agreement for the sale', was not in fact a true conditional sale, and that not-

withstanding the name given it, the ownership of the vessel in fact passed to the vendee."

The beneficial ownership and right to the enjoyment by possession of the motor boat had passed to the appellee. Under the terms of the agreement, he was expressly entitled to the possession and the right to use and enjoy the boat. He was in possession and was operating the boat at the time of the explosion. The "bare legal title" alone, was retained exclusively by appellant as security for the payment of the purchase price. It had no other or further interest in the boat.

On page 9 of the petition appellant cites the case of *The Boise Penrose,* 22 Fed. (2d) 919 (C. C. A 2d), as authority for the statement that "The court is misled, we think, by cases cited (Opinion, p. 5) to the effect that the vendor of a vessel under a conditional sales agreement is not liable for repairs or supplies furnished to the vessel, etc." Further, it is stated on the same page: "The basis of liability or nonliability for repairs or supplies furnished to the vessel when the owner is not in possession *depends solely upon the question of agency and nothing else.*"

This statement is not entirely accurate. The liability does not "depend solely upon the question of agency." It may arise out of agency, but at common law it does not exist because the mortgagee or vendor out of possession are not the *"owners"* of the vessel for the purpose of such liability. (See authorities cited in Appellee's Brief, pp. 13 to 19 incl.)

The theory of agency was advanced in the *Boise Penrose* case to establish the liability of a vendor out of possession, but the right to recover was denied. The theory had not been established by the evidence. We note with interest that the court in that case cited

with approval the cases of *Wendover* v. *Hogeboom*, 7 Johns. (N. Y.) 308, *Leonard* v. *Huntington*, 15 Johns. (N. Y.) 298, *Thorn* v. *Hicks*, 7 Cow. (N. Y.) 697, and *Morgan* v. *Shinn*, 15 Wall. 105. These cases are all cited in appellee's brief on the question of the liability of a mortgagee or vendor out of possession. *The Boise Penrose* case is distinctly an authority sustaining this court's opinion on this question.

On pages 10 to 13, inclusive, of the petition, it is argued that *The Milwaukee*, 48 Fed. (2d) 842, is controlling and should not have been distinguished by the court. While counsel for appellant may not admit it, *The Milwaukee* is in truth an authority for appellee.

In discussing the question of ownership under the statute limiting liability, the court said at page 842:

> "The judicial history of the act demonstrates that the question of ownership has been tested out, not by rigid inquiry respecting the muniments of title showing ownership to be absolute and unreserved, nor upon the mere form of transactions involving an interest in a vessel. *Rather is the inquiry directed to the relationship of one asserting himself, or charged to be, the owner with a view of ascertaining whether the relationship, whatever it is found to be, might reasonably furnish ground upon which a claim of liability for damage could be asserted.*"

This comment is clearly contrary to appellant's contention. Here, it seeks to test the question of ownership by reference only to muniments of title regardless of the question of liability. This, the court holds in *The Milwaukee* case is not the test.

In discussing the case of *Flink* v. *Paladini*, 279 U. S. 59, the court said in *The Milwaukee* case at the same page:

> "That case seems to indicate that whether or

> not one is to be deemed an 'owner' depends largely upon the possibility that he may be subjected to a liability which ordinarily is assertable against one having, or claiming to have, proprietorship or dominion over the subject of the proceeding. It negatives the thought that 'owner' of, or to 'own' a vessel means the situs of full title, interest, or dominion, and that nothing else is within the definition of the right or the range of the statute."

It seems to us, however, that the most significant facts in *The Milwaukee* case were continued possession and operation of the car ferry "Milwaukee" by the petitioner. Being in possession and engaged in operating the ferry, liability, if any, for the manner in which the ferry was operating rested upon the Car Ferry Company. But, in the instant case, appellant was not in possession and was not engaged in operating the motor boat at the time of the explosion and fire.

Let us suppose that under the conditional sales agreement in this case, appellee had purchased the motor boat for use upon Lake Michigan in transporting passengers and freight for hire; that the possession of the boat was delivered to appellee and he engaged in maritime commerce as above indicated; and that an accident occurred resulting in the loss of passengers and freight. Would the appellant appear in any court having jurisdiction and contend or confess that it was the owner of the motor boat? We apprehend not. And, further, we do not believe it could be held liable under such circumstances as an "owner." But appellee, being in possession and engaged in operating the motor boat, would be liable as "owner" if liability existed under the facts and circumstances here supposed.

II.

On page 23 of the petition, appellant cites the case of *Ex Parte Green*, 52 S. Ct. 602, as authority for the proposition that the admiralty court has "exclusive jurisdiction" in this case and other authorities to the same effect are cited on page 24 of the petition.

In each and all of the cases cited it appears that there was no controversy over the question of ownership; neither was there any question of the existence of liability that could be limited under the Limited Liability Statute in the absence of privity or knowledge.

In the instant case, however, it appears from the allegations of the libel that appellant was not the "owner" of the motor boat. It also appears from the allegations of the libel that since appellant's officers and agents were not in possession of the motor boat and were not operating it at the time of the explosion and fire, there is no liability upon appellant which can be limited, and, furthermore, it appears that the liability which appellee seeks to establish by the common law action is personal to appellant and therefore one which can not be limited.

The very facts, therefore, necessary to confer jurisdiction upon a court of admiralty and necessary to create a cause of action in admiralty, do not exist in this case, and the authorities cited by appellant are not in point.

It is respectfully submitted that the petition for rehearing should be denied.

ROY O. WEST,
PERCY B. ECKHART,
LEWIS C. JESSEPH,
Proctors for Appellee.

And afterwards, to wit: On the twenty-third day of July, 1932, there was filed in the office of the Clerk of this Court a Proof of Service, which said Proof of Service is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS.

No. 4710.

American Car and Foundry Company, a corporation,
Libelant and Appellant,
vs.
H. A. Brassert,
Respondent and Appellee.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.
Honorable
Geo. A. Carpenter,
District Judge.

I have this day served a copy of Appellee's Answer to Petition for Rehearing in the above cause on Messrs. Knapp, Beye, Allen, Cochran and Cushing, counsel for appellants.

Dated this 22nd day of July, 1932.

LOWELL A. LEONARD.

Endorsed: Filed July 23, 1932. Frederick G. Campbell, Clerk.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit begun and held in the United States Court Room in the City of Chicago in the Seventh Circuit on the fourth day of October, 1932, of the October Term in the year of our Lord one thousand nine hundred and thirty-two, and of our Independence the one hundred and fifty-seventh.

And afterwards, to-wit: On the thirteenth day of October, 1932, the following further proceedings were had and entered of record, to-wit:

Thursday, October 13, 1932.

Court met pursuant to adjournment and was opened by proclamation.

Present:

Hon. Samuel Alschuler, Circuit Judge, presiding.
Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Hon. James H. Wilkerson, District Judge.
Frederick G. Campbell, Clerk.
Henry C. W. Laubenheimer, Marshal.

Before:

Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.

American Car and Foundry Company, a corporation,
4710 *vs.*
H. A. Brassert

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

It is ordered by the Court that the petition for a rehearing in this cause be, and the same is hereby denied.

And afterwards, to-wit: On the seventeenth day of October, 1932, the Mandate of this Court issued to the District Court of the United States for the Northern District of Illinois, Eastern Division.

And afterwards, to-wit: On the twenty-fifth day of October, 1932, there was filed in the office of the Clerk of this Court, a Notice of Motion, which said Notice of Motion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 4710. October Term, A. D. 1932.

American Car and Foundry Company, a corporation, (*Libellant*) *Appellant*, *vs.* H. A. Brassert, (*Respondent*) *Appellee*.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division. Honorable **Geo. A. Carpenter**, District Judge.

NOTICE OF MOTION.

To Messrs. West and Eckhart,
38 South Dearborn Street,
Chicago, Illinois.

Please take notice that on Tuesday, October 25, 1932, at 9:30 o'clock A. M., or as soon thereafter as counsel can be heard, we will present to the United States Circuit Court of Appeals for the Seventh Circuit a motion to stay the mandate in this cause, a copy of which is presented to you herewith.

JOHN R. COCHRAN,
CHARLES J. HARDY,
Proctors for Appellant.

Received a copy of this notice and motion this 24th day of October, 1932.

ROY O. WEST,
PERCY B. ECKHART,
LEWIS C. JESSEPH,
Proctors for Appellee.

Endorsed: Filed Oct. 25, 1932. Frederick G. Campbell, Clerk.

And on the same day, to-wit: On the twenty-fifth day of October, 1932, there was filed in the office of the Clerk of this Court, a Motion to Stay Mandate, and Affidavit of Paul R. Conaghan in support of Motion, which said Motion and Affidavit are in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 4710. October Term, 1932.

American Car and Foundry Company, a Corporation, (*Libellant*) *Appellant*, *vs.* H. A. Brassert, (*Respondent*) *Appellee*.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division. Honorable Geo. A. Carpenter, District Judge.

MOTION TO STAY MANDATE.

Now comes American Car and Foundry Company, a corporation, appellant in the foregoing entitled cause, by John R. Cochran and Charles J. Hardly, its proctors, and moves this Honorable Court that the mandate herein be stayed until the Supreme Court of the United States has disposed of the petition for a writ of certiorari or the appeal or writ of error in this cause.

Respectfully submitted,

JOHN R. COCHRAN,
CHARLES J. HARDY,
Proctors for Appellant.

State of Illinois, } ss.
County of Cook. }

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

American Car and Foundry Company, a Corporation, (*Libellant*) *Appellant*, *vs.* H. A. Brassert, (*Respondent*) *Appellee*. } No. 4710.

AFFIDAVIT.

PAUL R. CONAGHAN, being first duly sworn, on oath deposes and says that he is one of the proctors for the appellant, American Car and Foundry Company, a corporation, in the foregoing entitled cause and that he is charged with the preparation of the records and briefs in said cause to be filed in the Supreme Court of the United States and that said appellant intends to apply to the Honorable Judges of the Supreme Court of the United States for a writ of certiorari or appeal or writ of error in said cause.

PAUL R. CONAGHAN.

Subscribed and sworne to before me this 24th day of October, 1932.

G. A. DINSMOOR,
(Seal) *Notary Public.*

Endorsed: Filed Oct. 25, 1932. Frederick G. Campbell, Clerk.

And on the same day, to-wit: On the twenty-fifth day of October, 1932, the following further proceedings were had and entered of record, to-wit:

Tuesday, October 25, 1932.

Court met pursuant to adjournment and was opened by proclamation.

Present:

Hon. Samuel Alschuler, Circuit Judge, presiding.
Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Hon. Walter C. Lindley, District Judge.
Frederick G. Campbell, Clerk.
Henry C. W. Laubenheimer, Marshal.

Before:

Hon. Samuel Alschuler, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Hon. Walter C. Lindley, District Judge.

American Car and Foundry Company, a corporation,
4710 *vs.*
H. A. Brassert

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Now comes this day counsel for appellant and presents a motion for recall and stay of the Mandate of this Court pending a petition to the Supreme Court of the United States for a writ of certiorari.

On consideration whereof: It is now here ordered that the Mandate in this cause be, and the same is hereby recalled and stayed until the further order of this Court.

It is further ordered that counsel for appellant proceed with diligence and promptly file the petition for a writ of certiorari in the Supreme Court of the United States and, upon the filing of said petition file in this Court proof of the filing of said petition in said Court.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing Printed pages, numbered from 27 to 82, inclusive, contain a true copy of the proceedings had and papers filed (excepting the briefs of counsel) in the case of

American Car and Foundry Company, a corporation,
Appellant,

vs.

H. A. Brassert,
Appellee,

No. 4710, October Term, 1931, as the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 30th day of November, A. D. 1932.

FREDERICK G. CAMPBELL,
(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed February 13, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.